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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURT BELOW

The opinion of the Court of Appeals for the Ninth Circuit and the dissenting opinions of Chief Judge Denman are reported in 175 F. 2d 983-993, and also appear in the printed transcript of record (R. 128-150, 152-156). The District Court below (District of Idaho) did not deliver an opinion.

BASIS UPON WHICH PETITIONER CONTENDS THAT THIS COURT HAS JURISDICTION

Petitioner, according to its petition for a writ of certiorari (Pet. 14) and its annexed brief in support of its petition (Pet. 28), seeks to invoke the jurisdiction of this Court pursuant to section 1651(a) and section 1254(1) of the Judicial Code, Title 28, United States Code, sections 1254(1) and 1651(a).

STATEMENT OF THE CASE

The matter involved in the decision of the Court of Appeals is an amended petition (R. 50-64, 65-76) to vacate a judgment. The Court of Appeals affirmed (R. 151) the District Court's order dismissing the amended petition to vacate the judgment (R. 80-82). The judgment attacked was entered by

the District Court on June 24, 1946 (R. 48-50) in accordance with a stipulation of settlement between the parties (R. 45-47) in an action brought in the District Court (jurisdiction being based on diversity of citizenship and the amount involved) by plaintiffs Alma R. Kingsbury and Olga Marquardt against the defendant Independence Lead Mines Co., an Arizona corporation (R. 2).

The basic question presented to the courts below was whether the petitioner corporation's amended petition (R. 50-64, 65-76) to vacate the judgment failed to state a claim against respondents upon which relief could be granted. — The District Court granted respondents' motion to dismiss (R. 79-80); and petitioner corporation having elected to stand on its amended petition and having declined to plead further, the District Court dismissed the amended petition (R. 80-82). Upon appeal the District Court's order was affirmed on February 28, 1949, one judge dissenting (R. 128, 151).

On August 8, 1949, petitioner corporation's "petition for rehearing in banc" was denied by the Court of Appeals, one judge dissenting with opinion (R. 152). Later, on August 22, 1949, the order of the Court of Appeals entered August 8, 1949 was amended to read as follows: "the petition for rehearing is denied." (R. 152) That amendatory order of August 22, 1949 was signed by circuit judges Healy and Orr who comprised the majority

of the Court in its decision of February 28, 1949 (R. 128). On August 23, 1949, by order of Chief Judge Denman five paragraphs were added to his dissenting opinion of August 8, 1949 (R. 153).

The petitioner's statement, in the petition for writ of certiorari, of "Principal Questions Passed on by the Court of Appeals for the Ninth Circuit" and "Summary of Facts" (Pet. 4-14) are in large part inaccurate because they contain many "factual" statements and contentions which are not supported by the allegations of the amended petition (R. 50-64, 65-76). Also, they omit statement of some significant facts which are shown in the transcript of record. Concise statement of the case in this brief opposing the petition for writ of certiorari does not permit detailed notation and rebuttal of the inaccuracies and omissions in petitioner's "factual" statements and contentions, particularly since they pertain much more to petitioner's factually inaccurate argument of the case, rather than to any reason why this Court in its discretion should allow a writ of certiorari.

The amended petition to vacate judgment (R. 50-64, 65-76) is accurately described and analyzed in the opinion of the Court of Appeals (R. 128-140). And in the following brief statement attention is focused on procedural history of the litigation in the District Court and on the number of, and the participation of, counsel for the Independence Lead Mines Co.

About a year after the stipulation, judgment and decree, petitioner corporation filed its petition to vacate (R. 50-64). (Although entitled "Motion," it has regularly been referred to as "petition.") Respondents moved to dismiss the petition on the ground that it failed to state a claim against respondents upon which relief could be granted (R. 65). Oral argument on that motion was heard on November 18, 1947, and points and authorities and briefs were submitted at the hearing (R. 77, 80). While the Court had the matter under advisement, on December 6, 1947 (R. 77) petitioner corporation served an amendment to its petition to vacate, amending paragraphs VI and VII (R. 65-76). Respondents, upon the same ground, moved to dismiss (R. 79) the amended petition. By stipulation (R. 77-78), the November 18, 1947 hearing was deemed a hearing on the motion to dismiss the amended petition, and further briefs were filed.

The District Court on February 9, 1948, having "fully considered the motions and other records and files in this cause," entered its order granting the motion to dismiss (R. 79-80). Thereafter, petitioner corporation having advised the Court that it desired to stand on its petition, as amended, and having declined to plead further, the Court entered its order dismissing the amended petition (R. 80-82). Thereupon, appeal was taken to the Court of Appeals, which affirmed the District Court's order (R. 151).

The record shows material facts and circumstances of the litigation, concluded by the stipulation, judgment and decree of June 1946, which are not mentioned in petitioner corporation's petition for writ of certiorari and supporting brief.

In July 1945, about one month after respondents Kingsbury and Marquardt filed their complaint (R. 2-33) against petitioner corporation, *Chas. E. Horning* and F. C. Keane, as attorneys for petitioner corporation, moved to dismiss the complaint (R. 34). *Chas. E. Horning*, as well as F. C. Keane, was an attorney for petitioner corporation throughout the litigation that concluded with the stipulation. judgment and decree of June 1946.

After a hearing, the Court on November 30, 1945 denied the motion to dismiss respondents' complaint (R. 34-35), and petitioner corporation on April 29, 1946 filed its answer, subscribed by petitioner corporation's attorneys *Chas. E. Horning, Eugene F. McCann* and F. C. Keane (R. 38-43).

On June 22, 1946, petitioner corporation through its signatory attorneys, F. C. Keane, Eugene F. McCann and Chas. E. Horning, entered into the stipulation (R. 45-47) which compromised and settled the case.

Judge Clark's judgment and decree (R. 48) recites:

> "This cause came on to be heard upon the pleadings at Coeur d'Alene, Idaho, the 24th day

of June, 1946, before the Court sitting without a jury, the plaintiffs being represented by their attorney, H. J. Hull, and the defendant by its attorneys, F. C. Keane, *Eugene F. McCann* and *Chas. E. Horning.* (Italics added)

"Thereupon the parties filed herein their stipulation that judgment be entered herein in favor of the plaintiffs and against the defendant, and the Court having examined the pleadings, and the stipulation, and having heard and considered the evidence adduced in support thereof, and being now fully advised in the premises:

"It is hereby ordered, adjudged and decreed and this does order, adjudge and decree:"

The amended petition to vacate the judgment (R. 50-64, 65-76) does not allege any fraud, lack of authority, professional neglect or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, petitioner corporation's attorneys who signed the stipulation and represented petitioner corporation in connection with the judgment and decree. Nor does the amended petition allege any fraud practiced in the procurement of the judgment by respondents, or their attorney or anyone acting in their behalf.

ARGUMENT

THERE IS NO SPECIAL AND IMPORTANT REASON FOR GRANTING A WRIT OF CERTIORARI

None of the "Reasons Relied on for Allowance of Writ" (Pet. 17-23) is a special and important reason why this court, as a matter of sound judicial discretion, should grant a writ of certiorari.

(A) This reason given by petitioner (Pet. 17-19) and petitioner's argument in favor of this reason (Pet. 29-30) are unsound as a matter of law, and do not appeal to sound discretion.

Petitioner contends (Pet. 30) that the decision of this court in *Textile Mills Corporation v. Commissioner of Internal Revenue*, 314 U. S. 326, "is a clear determination of the right of a litigant to consideration by the whole court" [of Appeals]. But that case contains no such determination. That case did determine that the five active judges of the third circuit could sit in banc for the determination of an appeal. Their authority to do so was in issue in that case; and they were held to have authority to sit in banc. But the case did not determine that a litigant as a matter of right could convene the court in banc to hear his case; nor did it determine that a litigant as a matter of right could petition for a rehearing in banc and

have all the active judges of the circuit consider and pass upon the question whether he should have a rehearing in banc.

For all that appears from the report of that case, the Court decided *sua sponte* to hear the case in banc. Similarly, in the Court of Appeals for the Ninth Circuit the case of *Alexander v. United States,* 173 F. 2d 867, 868, involved constitutional questions "of such importance that the court, *sua sponte*, ordered that it be heard in banc."

In *United States ex rel Robinson v. Johnston,* 316 U. S. 649, 650, this Court indicated that the particular circumstances of that case warranted a hearing in banc by the Court of Appeals, and remanded the case "for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc.*" But again the action was by the Judiciary, *sua sponte.*

It is significant that Section 46(c) of Title 28, United States Code, provides that:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service."

And it is significant that the "Reviser's Notes" (Title 28, United States Code, Congressional Service, p. 1707, 80th Congress, 2nd Session) state regarding Section 46:

"This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions."

It is also significant that when the new, revised Title 28 of the United States Code was enacted and approved (June 25, 1948), Section 44 provided the number of judges for each of the ten circuits, the number of judges varying from three to seven. It is common knowledge among members of the bench and bar and the Congress that from time to time judges have been added for those circuits in which the volume of business required additional judges. — It is obvious that if every disappointed litigant in a Court of Appeals could command consideration by all active judges of his petition for a rehearing in banc, the volume of petitions for rehearings in banc soon would impede accomplishment of the primary purpose of having more than three active judges in those circuits which have a heavy burden of appellate litigation.

It is also significant that the rules of the Court of Appeals for the Ninth Circut make no reference to a rehearing in banc.

It is clear that the decisions of this Court in the *Textile Mills* case, *supra,* and *United States v. Johnston, supra,* and the enactment of Section 46 of Title 28, have to do with the authority of a Court of Appeals, acting *sua sponte,* to hear or rehear a case in banc, and do not permit an unsuccessful litigant to insist that, as a matter of right, his petition for a rehearing in banc must receive the consideration of all circuit judges of the circuit who are in active service.

Certainly, the action of the Court of Appeals for the Ninth Circuit in connection with the petition for rehearing (R. 152) does not give petitioner any special and important reason for a writ of certiorari. Nor does that action furnish any basis for petitioner's vague request for some sort of a writ authorized by Title 28, United States Code, Section 1651(a).

(B) The statements set forth under "(B)" (Pet. 19-20) do not show any reason why this Court in the exercise of its sound judicial discretion should grant a writ of certiorari. In the last sentence of those statements (Pet. 20) there is an inference that respondents connived fraudulently with the president (F. C. Keane) of petitioner corporation; but examination of the amended petition to vacate judgment (R. 50-64, 65-76) shows that there is no allegation of any fraud practiced by respondents or their attorney or anyone acting on their be-

half, in the procurement of the judgment. The Court of Appeals reached this conclusion after analyzing the allegations of the amended petition to vacate judgment, as distinguished from the argument and contentions of petitioner (R. 128, 131-140; 175 F. 2d 983, 985-988).

(C), (D) and (E) The reason for granting a writ of certiorari which petitioner sets forth under "(C)" (Pet. 20-21) is predicated principally upon an assumption that the president (F. C. Keane) of petitioner corporation was neither a de jure nor de facto officer. That assumption begs a question decided differently by the Court of Appeals, which concluded that "From the recitals of the petition as a whole, however, it is plain that Keane and the other directors were at least de facto officers." (R. 133; 175 F. 2d 983, 985-986).

To some extent the reason set forth under "(C)", and to a large extent the reasons set forth under "(D)" and "(E)" of the petition for writ of certiorari (Pet. 21-22) are predicated upon a question begging assumption regarding "two large stockholders"—the respondents. As the Court of Appeals determined, the amended petition to vacate judgment (R. 50-64, 65-76) contains no allegation that respondents owned any stock in Independence other than the Class A common, "their title to which was being currently denied and contested by Independence." (R. 134; 175 F. 2d 983, 986). And the

Court of Appeals rejected (R. 135-138; 175 F. 2d 983, 986-987) the other contentions which petitioner corporation renews in its petition for a writ of certiorari under "(C)", "(D)" and "(E)". It should be noted that these so-called reasons advanced by petitioner are not reasons why this Court should grant the writ, but are repetition of contentions on the merits of the motion to dismiss.

(F) Petitioner states (Pet. 22) that the Court of Appeals "has decided an important question of local law, which is probably in conflict with the local decisions applicable." Again, however, petitioner's statement inaccurately assumes that the amended petition to vacate judgment (R. 50-64, 65-76) contains allegations which support petitioner's contention on the law. The amended petition to vacate judgment does not contain such allegations, as the Court of Appeals concluded (R. 128-140; 175 F. 2d 983-988); and consequently the local decisions referred to by petitioner (Pet. 34-36) are not applicable.

The local decisions applicable to the amended petition to vacate judgment are in accord with the rule of the federal courts; they are cited in the opinion of the Court of Appeals and are in accordance with the decision of the Court of Appeals (R. 132, 133, 139; 175 F. 2d 983, 985, 988).

(G) In this reason (Pet. 23) petitioner apparently contends by reference to its annexed brief (Pet. 47, 48) that the decision of the Court of Appeals is in conflict with the decision of this Court in *United States v. Throckmorton,* 98 U. S. 61.

However, petitioner in quoting from the opinion in the *Throckmorton* case (Pet. 47, 48) omits quotation of that part of the opinion which is applicable to the amended petition to vacate judgment (R. 50-64, 65-76). In the *Throckmorton* case, 98 U. S. 61, 65, this Court stated that the exception to the general rule or doctrine of res adjudicata is for those cases in which the successful party practiced the fraud. As this Court stated:

> "there is an admitted exception to this general rule in cases where, *by reason of something done by the successful party to a suit,* there was in fact no adversary trial or decision of the issue in the case." (Italics added)

On that point the *Throckmorton* case was followed in *Miller Rubber Co. v. Massey,* 36 F. 2d 466, 467 (C.A. 7th Cir.), cert. den. 281 U. S. 749, in which the Court stated:

> "The two well-established maxims of the law, interest rei publicae, ut sit finis litium, and nemo debet bis vaxari pro una et eadam causa, have certain exceptions. *But the exceptions are limited to cases where the opposing party or its agent prevented a fair trial.* Where there has been no bona fide adversary trial, courts of equity are anxious to grant relief so that complete justice may be done. But their will-

> ingness so to act is limited to cases where the unsuccessful party has been prevented from presenting the full strength of its case *by reason of something done, something misleading or deceptive practiced by the successful party.* No case has been cited to us where relief was granted without a showing that the successful party participated in. or connived at, the misconduct which led the defeated party to neglect or ignore one or more of its defenses." (Italics added)

The Supreme Court of Idaho has decided likewise, in *Van Gilder v. Warfield's Unknown Heirs and Devisees,* 63 Idaho 328, 120 P. 2d 243, 245. And the well established rule on this point is reflected in the *Restatement of the Law of Judgments,* Sec. 122 (p. 593), on which there is made this Comment (p. 596):

> "e. *Collusion or duress.* There is collusion where a party to an action or someone acting on his account induces a fiduciary to neglect, or to act contrary to, the interests of the beneficiary. This may be accomplished by a money payment or promise of future benefits to the fiduciary, or by causing him to act out of friendship or by pursuasion. *Mere knowledge that the fiduciary is neglecting the interests of the beneficiary does not constitute collusion; there must be some cooperation or activity in causing him to act wrongfully."* (Italics added)

It is apparent that the decision of the Court of Appeals is in accordance with both the federal rule and the local decisions, both of which were recognized and applied by the Court of Appeals (R. 138-139, 175 F. 2d 983, 987-988).

In connection with the above point, respondents through their counsel take note of one part of one of Chief Judge Denman's dissenting opinions (R. 154-155; 175 F. 2d 983, 992-993) in which respondents' attorney is charged (inferentially, at least, and upon the basis of the allegations in the amended petition to vacate judgment) with an "unethical wrong". The charge appears to involve an assumption that the applicable rules of the law of judgments are contrary to the decisions of the federal courts, contrary to the decisions of the Idaho Court and contrary to the *Restatement of the Law of Judgments,* Sec 122 (p. 593, 596), which were recognized and applied by the opinion of the Court of Appeals (R. 128-140; 175 F. 2d 983-988), in affirming the order of the District Court.

Also, the charge apparently is made in disregard of the fact of record, that Independence Lead Mines Co. was represented in the litigation by two other attorneys *in addition* to F. C. Keane. Chas. E. Horning *also* was an attorney for Independence in its motion to dismiss respondents' complaint (R. 34). And Mr. Horning and Eugene F. McCann *also* were attorneys for Independence in its answer to the complaint (R. 43). They *also,* as attorneys for Independence, signed the stipuulation of settlement (R. 45-47). And they *also* appeared in the District Court at the hearing before Judge Clark, at the conclusion of which hearing the judgment and decree were entered (R. 48-50). Their appear-

ance in the litigation and their signatures on the stipulation pursuant to which the District Court entered its judgment and decree on June 24, 1946, are at least a prima facie court record of their authority and of the good faith exercise of their professional judgment on behalf of petitioner corporation. *Bowles v. American Brewery,* 146 F. 2d 842, 847 (C.A. 4th Cir.); *Liken v. Shaffer,* 64 F. Supp. 432, 449 (D.C., N.D. Iowa). Neither in the original petition to vacate judgment (R. 50-64) nor in the amendments to paragraphs VI and VII (R. 65-76) is there any allegation which attacks that prima facie court record. See also: *Piccard v. Sperry Corporation,* 48 F. Supp. 465, 467, 469 (D.C., S.D.N.Y.), aff'd., per curiam, 152 F. 2d 462, cert. den. 328 U. S. 845.)

Independence Lead Mines Co. in its amended petition to vacate judgment (R. 50-64, 65-76) has not alleged any fraud practiced by respondents, or their attorney or anyone acting in their behalf, in the procurement of the judgment. Nor has Independence questioned the authority, good faith or diligence of attorneys Chas. E. Horning and Eugene F. McCann, who, as well as F. C. Keane, represented Independence, stipulated the compromise settlement, and appeared at the hearing before the District Court at which the judgment was entered.

It is submitted that the charge of an "unethical wrong", like the contentions of petitioner, has no support in either the allegations of the amend-

ed petition to vacate judgment (R. 50-64, 65-76) or the decisions of the courts. Furthermore, the charge of an "unethical wrong" is not in accordance with the considerations and decisions of the other three federal judges who heard this case in the courts below.

— — — — —

On the merits of the basic question which was before the Court of Appeals—whether the amended petition to vacate judgment fails to state a claim against respondents upon which relief could be granted—the petition for a writ of certiorari and annexed brief contain considerable argument. On that basic question, it is submitted that the following argument is manifestly correct:

I. The amended petition's alleged fraud, which prior to judgment was alleged in petitioner corporation's 1946 answer, is now res adjudicata. — It is well settled law that fraud which was in issue, or could have been dealt with, in litigation concluded by a judgment can not be made the basis of an attack on that judgment.

II. The courts uniformly hold that relief against a judgment for fraud will be granted only where the successful party practiced the fraud in the procurement of the judgment. — And petitioner corporation has not cited any case holding otherwise.

III. The amended petition does not allege any fraud practiced by or on behalf of respondents in the procurement of the judgment. — Furthermore, petitioner corporation's argument, that respondents participated in fraud in procuring the judgment, is unsupported by the amended petition's allegations; it is unsupported by the cases cited by petitioner; and it is contrary to established law. — The amended petition comes closer to alleging coercion of respondents than it does to alleging fraud practiced by respondents.

IV. The law favors settlement of litigation; and in the absence of fraud practiced by respondents in its procurement, the stipulated judgment will not be set aside. — F. C. Keane and other officers of petitioner corporation were at least de facto officers; and in any event their authority can not be attacked collaterally in this litigation. — Moreover, petitioner corporation's amended petition does not contain any allegation of fraud, lack of authority, lack of diligence or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, attorneys who (as well as F. C. Keane) represented petitioner corporation in the litigation and signed the stipulation of judgment.

The District Court obviously acted well within its sound legal discretion in dismissing petitioner corporation's amended petition to vacate judgment. And the Court of Appeals, in affirming the District Court's order, decided the case substantially in accordance with the above argument, and in accordance with the applicable decisions, which are cited in the opinion (R. 128-140; 175 F. 2d 983-988).

— — — — —

CONCLUSION

The petitioner, Independence Lead Mines Co., has not presented any special and important reason why this Court, in the exercise of its sound legal discretion, should grant a writ of certiorari.

Respectfully submitted,

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November 1949